# Petition

81-587

No.

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ALEXANDER L. STEVAS,
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IN THE

# Supreme Court of the United States

OCTOBER, 1981 TERM

JAMES H. EWING, M.D., individually and as a Professional Association, *Petitioner,*

v.

VERNON E. BAUMRIND,
*Respondent.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether it is proper to read into the wiretap prohibitions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Sections 2510, *et seq.*, an exception for so-called "domestic wiretaps."

2. If there should be an exception to the wiretap prohibitions, whether the exception should extend to permit use of evidence obtained as a result thereof in non-domestic actions involving a person or persons not a member of the family.

3. If there should be an exception to the wiretap prohibitions, whether the exception should extend beyond the direct suppression provisions of the Act so as to preclude as well an action for damages arising from violation of the letter of the Act.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Table of Authorities | iii |
| Opinions Below | 1 |
| Grounds on which Jurisdiction is Invoked | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Petition | 6 |
| Conclusion | 11 |
| Appendix | A-1 |


## TABLE OF AUTHORITIES

### Cases Cited


| | |
|---|---|
| Anonymous v. Anonymous, 558 F. 2d 677 (2nd Cir., 1977) | 6 |
| Baumrind v. Ewing, ___ S.C. ___, 279 S.E.2d 359 (1981) | 1 |
| Beaber v. Beaber, 322 N.E.2d 910 (Ohio Family Court, 1974) | 6 |
| Berk v. Berk, 406 N.Y.S. 2d 247 (1978) | 6 |
| Campiti v. Walonis, 611 F.2d 387 (1st Cir., 1979) | 7 |
| Delbard v. U.S., 408 U.S. 41, 92 S.Ct. 2357 (1972) | 9 |

Hisquierdo v. Hisquierdo, ___ U.S. ___, 99 S.Ct. 802 (1979) ..... 11

In Re Marriage of Lopp, 268 Ind. 690, 378 N.E.2d 414 (1978) ..... 6

Kratz v. Kratz, 477 F.Supp. 463 (E.D.Pa., 1979) .... 7

London v. London, 420 F. Supp. 944 (S.D.N.Y., 1976) 6

McCarty v. McCarty, ___ U.S. ___, 101 S.Ct. 2728 (1981) ..... 10

Remington v. Remington, 393 F.Supp. 898 (E.D.Pa., 1975) ..... 7

Rickenbaker v. Rickenbaker, 226 S.E.2d 347 (N.C. 1976) ..... 7

Simpson v. Simpson, 490 F. 2d 803 (5th Cir., 1974), cert. den., 419 U.S. 897 ..... 6

Stamme v. Stamme, 589 S.W.2d 580 (Mo. App. 1979) 7

State v. Jock, 404 A.2d 518 (Del. Super. Ct. 1979) .. 7

United States v. Giordano, 416 U.S. 505, 514, 94 S.Ct. 1820 (1974) ..... 9

United States v. Jones, 542 F.2d 661 (6th Cir., 1976). 7

United States v. Rizzo, 583 F.2d 907 (7th Cir., 1979), *cert. den.*, 99 S.Ct. 1216 ..... 7

United States v. Schrimsher, 493 F.2d 848 (5th Cir., 1974) ..... 7

White v. Weiss, 535 F.2d 1067 (8th Cir., 1976) ..... 7

**Statutes Cited**

28 U.S.C. Section 1257(3) ..... 2

18 U.S.C., Sections 2510, *et seq.* ..... 3

**Law Review Articles**

Note, *Marital Litigation: Impact of Title III of Omnibus Crime Control and Safe Streets Act of 1968*, 58 Neb. L.Rev. 1180 (1979) ..... 7

Comment, *Interspousal Electronic Surveillance Immunity*, 7 Toledo L.Rev. 185 (1975) ..... 9

*Title III: The Extension Telephone Exemption and Intra-Family Wiretaps, 17 Journal of Family Law 763 (1978-1979)* ..... 8

**Miscellaneous**

U.S. Const. art. XI, section 2 ..... 2

U.S. Const. amend X ..... 2

U.S. Const. amend. XIV ..... 2

Title III of the Omnibus Crime Control and Safe Streets Act—Wire Interception and Interception of Oral Communications ..... 3

1968 U.S. Code Cong.,& Ad.News, 90th Cong.2d Sess. at 2274 ..... 10

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Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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## PETITION FOR WRIT OF CERTIORARI

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The petitioner, James H. Ewing, M.D., respectfully requests that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of the State of South Carolina in this case.

### OPINIONS BELOW

The unreported opinion of the Honorable John Hamilton Smith, Judge of the Court of Common Pleas of the Circuit Court for the Twelfth Judicial Circuit in this case was handed down on October 3, 1979, and is reproduced here as Appendix A. The opinion of the Supreme Court of South Carolina, which is reported as Baumrind v. Ewing, ___ S.C. ___, 279

S.E. 2d 359 (1981), was handed down May 19, 1981, and is reproduced herein as Appendix B. The Order of the Supreme Court of South Carolina denying petitioner's request for re-hearing was handed down June 22, 1981, and is herein reproduced as Appendix C.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The decision of the South Carolina Supreme Court in Baumrind v. Ewing, ___ S.C. ___, 279 S.E.2d 359 (1981) was handed down on May 19, 1981. The petition for re-hearing was denied on June 22, 1981. This petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C., Section 1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article XI, Section 2 of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

4. Relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act—Wire Interception and Interception of Oral Communications—18 U.S.C. Sections 2510-2520, are set forth in the Appendix as Appendix D.

## STATEMENT OF THE CASE

Vernon Baumrind commenced an action against James H. Ewing, by service dated January 2, 1979. He alleged three causes of action, including alienation of affection, criminal conversation, and a form of medical malpractice.

It eventually developed that a source of substantial amounts of the information upon which he relied in deciding to file his action was electronic interception of telephone calls to and from his residence.

While living in the marital home with his wife, Baumrind installed an extension telephone in an upstairs closet and attached a recording device to it. This was done on December 9, 1978, for the explicit purpose of intercepting all incoming and outgoing telephone calls to and from his residence. Neither the extension telephone nor the recording device attached to it were obtained from a communications carrier in the course of its business, and both the telephone and recording device were explicitly concealed in the closet. Baumrind eventually hired a private investigator to conduct his own surveillance, the activities of whom are not herein questioned.

Ewing moved in the trial court for an Order suppressing the introduction of taped conversations between Ewing and Baumrind's wife. He further moved at the same time for an

Order permitting him to amend his answer to add a counterclaim against Baumrind. Both the Request for Suppression and the Request For Permission to Amend and State a Counterclaim were explicitly based on the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510, *et seq.*, (the Act.). By its Order dated October 3, 1979, reproduced herein as Appendix A, the Trial Court denied both motions. The Trial Court explicitly construed the Act as being inapplicable under the facts of the case due to the existence of an implied "domestic wiretap" exception to it.

Appeal from this Order was duly taken to the Supreme Court of the State of South Carolina, the opinion of which is reproduced herein as Appendix B. As is reflected in the brief of the respondent Baumrind, the questions presented to that Court were:

I. Did the lower Court, under the facts of this case, err in refusing appellant's motion to suppress tape recorded conversations and the transcripts thereof?

II. Did the Trial Court err in refusing appellant's motion and amended motion to be allowed to file amended and supplemental answers, containing counterclaims?

On petition for re-hearing, Ewing specifically pointed out to the South Carolina Supreme Court:

> The subject case is a civil proceeding to obtain judgment for damages alleged to result from tortious conduct by [Ewing]. [Ewing] is not a spouse. This case does not involve a traditional area of domestic relations. • • •

The entire petition for re-hearing is attached hereto as Appendix E.

Thus, all of the Questions Presented for Review herein have explicitly been presented to and passed upon by the South Carolina Supreme Court. The South Carolina Supreme Court has issued a final decision regarding the availability to petitioner of federally created rights claimed by him, and has found against the availability of those rights.

## REASONS FOR GRANTING PETITION

There is a substantial split among the Federal Circuits and among various state Courts regarding the precise question here raised.

In what is generally termed the "Simpson" line of cases, the Second Circuit and Sixth Circuit have adopted the position that the general prohibitions of the Act do not apply to inter-spousal wiretaps, while acknowledging that the specific language of the Act and much of its legislative history indicate that it was the intent of Congress that such application should be made. See *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. den.*, 419 U.S. 897; *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977). *See also, London v. London*, 420 F.Supp. 944 (S.D.N.Y. 1976). The Indiana Supreme Court permitted use of wiretap evidence in connection with the charge of fraud upon the Court in a domestic matter in *In Re Marriage of Lopp*, 268 Ind. 690, 378 N.E.2d 414 (1978). In *Beaber v. Beaber*, 322 N.E.2d 910 (Ohio Family Court, 1974), the Judge held that neither the federal wiretap statutes nor the right of privacy under the United States Constitution prevented the receipt into evidence of a husband's wiretapping of a wife's telephone conversations in the marital home. That opinion was affirmed in an unpublished opinion by the Ohio Court of Appeals, *Beaber v. Beaber*, No. 4187 (Ohio App., 5th Dist., Aug. 4, 1975). *See also, Berk v. Berk*, 406 N.Y.S. 2d 247, (1978) where the Court dealt with tape recordings of telephone conversations between a mother and her children which had been taped by the father, and held them admissible as evidence in a custody determination because:

> Where the custody of a child is at issue the strict rules of evidence need not be followed. (406 N.Y.S. 2d at 248.)

Of course, the South Carolina Supreme Court explicitly stated that it was "persuaded by the analysis of the Fifth

Circuit employed in *Simpson* (279 S.E.2d at 360) in the case with which we are here concerned.

The other line of cases is frequently termed the *"Jones"* line, after *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), in which the Sixth Circuit distinguished *Simpson* on its facts and specifically rejected its reasoning. Numerous other courts have followed both of these courses in finding domestic wire-taps of various sorts to be covered by the Act. See *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976); *Kratz v. Kratz*, 477 F.Supp. 463 (E.D.Pa. 1979); *Remington v. Remington*, 393 F.Supp. 898 (E.D.Pa. 1975); *Stamme v. Stamme*, 589 S.W.2d 580 (Mo. App. 1979); *State v. Jock*, 404 A.2d 518 (Del. Super. Ct. 1979); and *Rickenbaker v. Rickenbaker*, 226 S.E.2d 347 (N.C. 1976). *See also, United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974), and *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979), in which the Fifth and First Circuits indicated some uneasiness with the *Simpson* approach. Finally, *see, United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1979), *cert. den.*, 99 S.Ct. 1216, in which the Seventh Circuit imposed liability upon a private detective instructing and assisting in an interception, but indicated basic agreement with the *Simpson* rationale regarding purely inter-spousal wire-tap activity.

The split among the Circuits and among the State Courts on this matter is explicit, and commentary, both in the Courts and the Law Reviews, has been substantial and pointed. *See, e.g.*, Note, *Marital Litigation: Impact of Title III of Omnibus Crime Control and Safe Streets Act of 1968*, 58 Neb. L.Rev. 1180 (1979):

> The fact that the *Rizzo* Court expressly refused to choose between the interpretations given Title III in *Simpson* and *Jones* vividly points out the need for a final judicial resolution of the marital surveillance issue. Such resolution is imperative to give the justice department an indication of the current

> judicial attitude, and, importantly, to give each individual knowledge of the possible limitations of his or her right to privacy. (58 Neb. L.Rev., at 1192.)

*See also, Title III: The Extension Telephone Exemption and Intra-Family Wiretaps,* 17 Journal of Family Law 763 (1978-1979):

> "There is no statutory authority for *Simpson's* implied inter-spousal exception to the federal wiretap law. The language of Title III is explicit and inclusive and has been shown by the Courts in *Jones* and *Rickenbaker* to be consistent with congressional awareness and intent. The view, expressed in *Simpson,* that the extension phone exception is indicative of congressional intent to avoid the question of the extent of intra-family privacy rights is unsupportable. • • • A straightforward application of the extension phone exemption would not have exonerated the defendant in *Simpson.* The Court, therefore, used the exemption 'through the backdoor' to buttress its determination of an implied exception." (17 Journal of Family Law at 794.)

As this case demonstrates, third persons outside of the marital home are often implicated in one manner or another by the so-called "domestic wiretap." In the *Rizzo* case, *supra,* a private investigator was held liable. In *Kratz, supra,* an attorney who advised his client regarding wiretaps in a domestic situation was held potentially subject to civil liability. Thus, the confusion created by the conflicting precedents has had substantial adverse effect already.

Finally, it should be pointed out that the individual pub-

ıicly credited with being the author of Title III, Professor Robert Blakey, has been quoted as having written that:

> Title III was intended to mean what it says—no surveillance by third parties without a warrant—by cops, spouses, or in business-labor or any other relevant relations. (Comment, *Interspousal Electronic Surveillance Immunity*, 7 Toledo L.Rev. 185, 205, n.85, 1975.)

All of the foregoing is against the background of decisions regarding this law in general by this Court which indicates that the law should be strictly enforced and enforced as written. *Delbard v. U.S.*, 408 U.S. 41, 92 S.Ct. 2357 (1972) noted that the Act evidenced an overriding congressional concern for the protection of privacy, and in *U.S. v. Giordano*, 416 U.S. 505, 514, 94 S.Ct. 1820, 1826 (1974), this Court wrote regarding this Act:

> The purpose of the legislation . . . was effectively to prohibit . . . all interceptions of oral and wire communications except those specifically provided for in the Act. . . .

This situation needs clarification badly. The instant case is an excellent one for the purposes, because it presents a "clean" issue. Here, the husband wiretapped his own telephone, in the marital residence, while the parties were still living together (although they had begun to experience marital difficulties). No third party is involved directly in the wiretap operation, but a third party is specifically involved in the case at bar, which makes the case an excellent vehicle for determining not only whether there should exist any right to an inter-spousal wiretap exception, but for exploring at least two further possible ramifications of the existence of such an exception:

(1) Whether the existence of such an exception necessarily implies that any and all uses of evidence obtained as the result of conduct falling within the exception are permissible notwithstanding the broad sweep of the Act; and

(2) Whether the exception, if one exists, runs across the Act or exists solely to the direct suppression section, 18 U.S.C. Section 2515.

Although petitioner takes the position that the Act contains no exception for domestic relations wiretaps and was not intended to, if it eventually be found that such does exist, there would be nothing inherently contradictory in finding that that exception existed solely for the purpose of permitting the use of testimony in direct domestic actions, at the risk of the party choosing to make use of the wiretap evidence insofar as separate damage actions or criminal actions were concerned. Such a rule, permitting suppression to be circumvented but placing the actor at his peril in so doing, would have a substantial appeal as a way of imposing some safeguards short of absolute prohibition of the use of electronic equipment in the family situation.

Finally, this case would give the Court an opportunity to set some more clear guidelines around the rights of the States to order their domestic relations laws and practices when a federal right is involved in their doing so. Since both Congress and this Court have indicated that the Act is a significant and explicit expression of the Congressional will, and since the legislative history demonstrates in part that Congress had domestic relations in mind in passing it (*see e.g.*, the comment of Senator Strom Thurmond regarding the Act): "A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." (1968 U.S. Code Cong. & Ad. News, 90th Cong.2d Sess., at 2274.), the statute would appear to fall in line with those construed in the recent cases of *McCarty v.*

*McCarty*, ___ U.S. ___, 101 S. Ct. 2728 (1981) and *Hisquierdo v. Hisquierdo*, ___ U.S. ___, 99 S.Ct. 802 (1979).

## CONCLUSION

Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX CONTENTS

A. Opinion and Order of the Honorable John Hamilton Smith, Judge of the Court of Common Pleas of the 12th Circuit, October 3, 1979 ..... A-2

B. Opinion of the Supreme Court of South Carolina, May 19, 1981 ..... A-6

C. Order of the Supreme Court of South Carolina denying Petitioner's request for re-hearing, June 22, 1981 ..... A-10

D. Relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act—Wire Interception of Oral Communications—18 U.S.C. Sections 2510-2520 ..... A-11

E. Petition for Re-hearing ..... A-19

## APPENDIX A

STATE OF SOUTH CAROLINA,
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
79-CP-21-7

Vernon E. Baumrind,
Plaintiff,

vs.

James H. Ewing, M.D.,
individually and as a
Professional Association,
Defendant.

**Order**

(File October 5, 1979)

This is an action for alienation of affections, criminal conversation and malpractice. The Defendant has filed a motion to suppress any evidence obtained by the Plaintiff through the interception of certain telephone conversations held between the then wife of the Plaintiff and the Defendant. The Defendant also filed a motion requesting leave to file a counterclaim for damages as a result of alleged illegal wire-taps.

I deny both motions.

The attorneys for both parties are in apparent accord that the Plaintiff, suspecting his wife of infidelity, did "tap" the telephone in the marital home occupied by the Plaintiff and

his wife. The tapes from these conversations were subsequently used at the trial in the divorce action between the Plaintiff and his wife. The Plaintiff now intends to utilize the tapes in the present action.

The Defendant contends that the tapes and all evidence stemming therefrom should by excluded by virtue of 18 U.S.C. Sec. 2510, *et seq*. The question would appear to be whether this particular statute was intended to apply to a "wiretap" conducted under the circumstances before the Court. I find that it does not apply.

In *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), a wife brought an action against her husband for damages for using a wiretap. The Court went extensively into a discussion of the legislative intent involved in the "Omnibus Crime Control and Safe Streets Act of 1968," 18 U.S.C. Sec. 2510, *et seq*., and concluded that where the wiretap by the husband took place within the marital home for the purpose of intercepting his wife's calls that such activity was not within the legislative intent of the Act.

*Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977), is another action in which a telephone was tapped in regard to a domestic difficulty, except here, the parties were divorced and the purpose of the wiretap was to procure information relative to the custody of their child. The taped conversations were between the child and the ex-wife, and the former husband had the recording device on his telephone. The Court stated that: "The issue becomes at what point interspousal wiretaps leave the province of mere marital disputes, a matter left to the States, and rise to the level of criminal conduct proscribed by the federal wiretap statutes." It was held that the facts presented a purely domestic conflict and that same did not rise to the level of a violation of the federal statute.

In *Beabe v. Beabe*, 322 N.E.2d 910 (1974), the Ohio Court

also held that tapes from a "wiretap" by a husband of a wife's conversations were not inadmissible for purposes of impeachment under federal statutes. The Court said: "The marital home is and should be of private concern of the two parties to the marriage. What takes place behind that marital veil is not normally a public concern or discernment. When one of the parties violates the marriage contract within the confines of the home and is sufficiently secretive so as to avoid public knowledge, the other party is placed in an indefensible position."

The Defendant relies, in part, upon *Rickenbaker v. Rickenbaker*, 226 S.E. 2d 347 (1976), in which the North Carolina Court excluded evidence of adulterous conduct through a wiretap by a husband of his wife's telephone calls. Here, the husband and wife had separated and were living apart. The husband obtained an extension telephone to the residence telephone used by his wife and had the extension placed in his office downtown. The Court was careful, however, to distinguish *Simpson* by saying that in *Simpson* both husband and wife were living together in the marital home, whereas in *Rickenbaker* the parties were "living in a state of separation so that the marital veil which separates the marriage relation from public concern and scrutiny had been torn asunder. Thus the statutory regulation did not invade the realm of personal acts within a marital home."

The Defendant further contends that as this is an action against him rather than being a dispute between the husband and wife, as is the situation in all the cases cited, that the evidence should be excluded. I disagree with this contention. Once finding that the "wiretap" involved is not prohibited under the statute for the same reasons as set forth in *Simpson* and like cases, I conclude that the evidence obtained can be used as well in the present action.

As a result of my conclusion that the statute in question has

not been violated, I deny the Defendant's motion to counterclaim for damages for the alleged illegal wiretap. Therefore, it is

ORDERED, that the Defendant's motions to suppress and to be allowed to counterclaim for damages as a result of an alleged illegal wiretap are denied.

/s/ John Hamilton Smith

October 3, 1979.

## APPENDIX B

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vernon E. Baumrind,
*Respondent,*

v.

James H. Ewing, M.D.,
Individually and As A Professional Association,
*Appellants.*

**Appeal From Florence County**
**John Hamilton Smith, Judge**

Opinion No. 21455
Filed May 19, 1981

AFFIRMED AND REMANDED

Edward J. Dennis, IV, of Dennis, Dennis & Watson,
of Moncks Corner;
and Robert L. Kilgo, Sr., of Kilgo, Alexander & Kilgo,
of Darlington,
*for appellants.*

Jan L. Warner,
of Sumter,
*for respondent.*

GREGORY, A.J.: Respondent Vernon E. Baumrind brought this action for alienation of affection and criminal conversation against appellants James H. Ewing, M.D., individually and as a Professional Association [Ewing]. Before trial Ewing moved to suppress certain recorded telephone conversations as violative of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., §2510, *et seq.* [the Act]. The trial judge found the Act inapplicable and denied the motion.

This appeal followed. We affirm.

The recordings in question are the product of interspousal espionage. Suspecting his wife's infidelity, Baumrind installed an extension telephone and recording device in the upstairs closet of the marital home. Neither the phone nor the recorder was obtained from a communications carrier in the course of business. Both were installed on Baumrind's initiative and without assistance.

Pretending he was going to work, Baumrind would park his car at a church nearby and slip back into the home. He sometimes spent entire days listening in on and recording his wife's telephone conversations with Ewing. It is the fruits of these protracted eavesdropping sessions which Ewing seeks to suppress as violative of the Act.[1]

We have examined the legislative history of the Act and concur in the judgment of the United States Cour of Appeals for the Fifth Circuit that the task was "long, exhaustive and inconclusive." Simpson v. Simpson, 490 F.2d 803, 806 (5th

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[1]The Act provides in pertinent part:

"2511—Interception and disclosure of wire or oral conversations prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

• • • •

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §2511(a) & (d).

Cir. 1974), *cert. denied*, 419 U.S. 897 (1974). There can be no doubt, however, that the congressional intent and the naked language of the statute itself call for a broad prohibition against the interception of wire or oral communication.

Although the legislation is not limited in its application to criminal proceedings, S. Rep. 1097, reprinted in U.S. Code Cong. & Admin. News, 1968, 90th Cong., 2d Sess., at 2185, the impetus behind its enactment was clearly the desire to combat organized crime. Id., at 2157. That primary purpose notwithstanding, the legislative history does reflect a congressional intent that the Act embrace wiretapping in the field of domestic affairs as well[2]. The extent of its breach is the critical question before us.

The federal appellate courts which have faced the issue we meet here are sharply divided. The Fifth Circuit in a case similar to the one at bar recognized an implied interspousal wiretap exception to the Act, concluding "Congress did not intend such a far-reaching result, one extending into areas normally left to the states, those of the marital home and domestic conflicts." Simpson v. Simpson, *supra*, 490 F.2d at 805; accord, Anonymous v. Anonymous, 558 F.2d 677 (2nd Cir. 1977) [Simpson rational[e] extended to include all family members].

In contrast, the Sixth Circuit Court of Appeals found the broad and clear language of the Act to express "a blanket prohibition on all electronic surveillance except under circumstances specifically enumerated in the statute." United States v. Jones, 542 F.2d 661, 667 (6th Cir. 1976). Congress was certainly aware of the use of wiretap surveillance in domestic cases, the *Jones* court reasoned, but chose not to specify the "interspousal tap" as an excepted circumstance. Accordingly, the Sixth Circuit in *Jones* held the Act to apply.

Reason exists for the adoption of either view. Nevertheless

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[2]Senator Strom Thurmond commented: "A broad prohibition is imposed on private use of electronic surveillance, *particularly in domestic relations* and industrial *espionage situations*." (emphasis ours) S. Rep. 1097, *reprinted* in U.S. Code Cong. & Admin. News, 1968, 90th Cong. 2d Sess., at 2274.

we are persuaded by the analysis the Fifth Circuit employed in *Simpson*, which we find more factually apposite to the case at bar. *Jones* involved a wiretap by a husband of his *estranged* wife's telephone, whereas in *Simpson* the parties lived together at the time of the wiretap. See also, Rickenbaker v. Rickenbaker, 226 S.E.2d 347 (N.C. 1976).

Here there is no third party surveillance involved; the husband, not a private investigator, conceived and employed the eavesdropping technique. The *Simpson* court felt private investigators conducting surveillance to be the real target of the Act in the domestic field. Moreover, the expectations of privacy of both Mrs. Baumrind and Dr. Ewing should reasonably be more restricted in conversations which could easily be overheard within the marital home. Had the Baumrinds been living separate and apart, the conversants' expectations of privacy would be greater; but whether a wiretap under those circumstances would, perhaps, dictate a different result we do not reach.

We hold the husband's conduct, under the circumstances that exist, is beyond the grasp of the federal statute. Domestic conflicts are traditionally and properly matters of state interest. We cannot believe Congress intended this legislation to intrude as far as this case would take it. The trial judge correctly denied the motion to suppress. We affirm his order and remand for trial.

AFFIRMED and REMANDED.

LEWIS, C.J., LITTLEJOHN, NESS and HARWELL, J.J., concur.

**APPENDIX C**

THE SUPREME COURT OF SOUTH CAROLINA

June 22, 1981

Edward J. Dennis, IV, Esquire
Messrs. Dennis, Dennis & Watson
337 Main Street
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Robert L. Kilgo, Sr., Esquire
Messrs. Kilgo, Alexander & Kilgo
248 East Hampton Street
Darlington, S.C. 29532

Re: Vernon E. Baumrind v. James H. Ewing, et al.

Dear Mr. Dennis and Mr. Kilgo:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.
s/ Bruce Littlejohn A.J.
s/ J.B. Ness A.J.
s/ George T. Gregory, Jr. A.J.
s/ David W. Harwell A.J.

June 22, 1981."

The remittitur is being sent down today.

Very truly yours,

s/ Frances H. Smith
CLERK

FHS/rl

cc: Jan L. Warner, Esquire

## APPENDIX D

Title III of the Omnibus Crime Control and Safe Streets Act—
Wire Interception of Oral Communications—
18 U.S.C. Sections 2510-2520
(Relevant Portions)

### §2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision therof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdic-

tion of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

• • •

**§2511. Interception and disclosure of wire or oral communications prohibited**

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facil-

ities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

> (A) a court order directing such assistance signed by the authorizing judge, or
>
> (B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance with respect to

which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, employee or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for

the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

• • •

**§2515. Prohibition of use as evidence of intercepted wire or oral communications**

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States,

a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

• • •

**§ 2520. Recovery of civil damages authorized**

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

**APPENDIX E**

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY
HONORABLE JOHN HAMILTON SMITH, JUDGE

Vernon E. Baumrind,
*Plaintiff-Respondent,*

—versus—

James H. Ewing, M.D., Individually
and as a Professional Association,
*Defendants-Appellants.*

**Petition for Rehearing**

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ATTORNEY FOR RESPONDENT.

This Court filed its opinion herein, numbered 21455, on

May 19, 1981. Appellant hereby petitions for a rehearing pursuant to Rule 17 of the South Carolina Supreme Court.

Appellant respectfully submits that the following points have been overlooked or misapprehended by this Court.

I

The subject case is a civil proceeding to obtain judgement for damages alleged to result from tortious conduct by Appellant. Appellant is not a spouse. This case does not involve a traditional area of domestic relations. Certainly, it is not an area within the jurisdiction of the Family Court.

II

The opinion of the Court, as written, omits any mention of the most recent case decided by the Federal Courts and argued by Appellant in his Reply Brief, *Kratz* v. *Kratz*, 477 F. Supp. 463 (1979). We feel that the aforesaid case is noteworthy because in that case, as in the instant case, the husband and wife lived together in the marital home.

Respectfully submitted,

s/ EDWARD J. DENNIS, IV

s/ ROBERT L. KILGO, SR.

Attorneys for Defendants-Appellants.

Columbia, South Carolina
May 27, 1981.

# Opposition

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CLERK

No. 81-587

# In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. EWING, M.D., INDIVIDUALLY AND AS A PROFESSIONAL ASSOCIATION, PETITIONER,

*versus*

VERNON E. BAUMRIND, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the May, 1981 Opinion of the South Carolina Supreme Court, which Petitioner seeks to have this Court review on certiorari, is a final judgment or decree as is required by 28 U. S. C. § 1257.

2. Whether a husband, while living with his wife and two (2) children in the conjugal relationship, in a common dwelling house in the State of South Carolina, who became suspicious of his wife's fidelity, and who thereafter monitored and recorded telephonic communications between his wife and her lover, made over the family telephone, in the family residence, and there monitored and recorded, the husband being the subscriber for the family telephone service, violated 18 U. S. C. § 2511 *et seq.*

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 3 |
| Conclusion | 11 |

## TABLE OF AUTHORITIES


PAGE

Cases:

Anonymous v. Anonymous, 558 F. 2d 677 ..... 9
Benford v. American Broadcasting Company, 502 F. Supp. 1159 ..... 10
Bubis v. United States, 384 F. 2d 643 ..... 7
Bufalino v. Michigan Bell Telephone Company, 404 F. 2d 1023 ..... 7
California v. Stewart, 384 U.S. 436 ..... 5
Costarelli v. Massachusetts, 421 U.S. 193 ..... 4
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 ..... 4, 5
DiPiazza v. United States, 420 U.S. 949 ..... 7
Kratz v. Kratz, 477 F. Supp. 463 ..... 10
London v. London, 420 F. Supp. 944 ..... 9
Market Street R. Co. v. Railroad Commission, 324 U.S. 548 ..... 3
North Dakota Board of Pharmacy v. Snyders Drug Stores, Inc., 414 U.S. 156 ..... 4
Olmstead v. United States, 277 U.S. 438 ..... 9
Radio Station WOW v. Johnson, 326 U.S. 120 ..... 4
Rathbun v. United States, 355 U.S. 107 ..... 7, 8
Remmington v. Remmington, 393 F. Supp. 898 ..... 10
Rickenbaker v. Rickenbaker, 226 S.E. 2d 347 ..... 10
Simpson v. Simpson, 490 F. 2d 803 ..... 9
United States v. Gallo, 123 F. 2d 229 ..... 7
United States v. Jones, 542 F. 2d 661 ..... 9
United States v. Rizzo, 583 F. 2d 908 ..... 10
White v. Weiss, 535 F. 2d 1067 ..... 10

Statutes:

18 U.S.C. 2510 (5) ..... 7
18 U.S.C. 2510 (5) (a) ..... 8
18 U.S.C. 2511 ..... 6
18 U.S.C. 2511 (1) ..... 6
18 U.S.C. 2511 (2) ..... 7
28 U.S.C. 1257 ..... 3, 4, 6
28 U.S.C. 1257 (3) ..... 1
47 U.S.C. 153 (h) ..... 8
47 U.S.C. 605 ..... 7

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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**No. 81-587**

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JAMES H. EWING, M.D., INDIVIDUALLY AND AS A PROFESSIONAL ASSOCIATION, PETITIONER,

*versus*

VERNON E. BAUMRIND, RESPONDENT

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The Order of the Trial Court, filed October 5, 1979, (Pet. App. A-2) is unreported. The Opinion of the South Carolina Supreme Court (Pet. App. A-6) is reported at 279 S. E. (2d) 359 (1981). The Petition for a rehearing was denied on June 22, 1981. (Pet. App. A-10).

### JURISDICTION

The judgment of the South Carolina Supreme Court was filed on May 19, 1981. (Pet. App. A-6.) The Petition for a rehearing was denied on June 22, 1981. (Pet. App. A-10.) The Petition for a Writ of Certiorari was docketed on September 21, 1981. Petitioner has attempted to invoke jurisdiction pursuant to 28 U. S. C. § 1257 (3). Respondent

opposes the invocation of jurisdiction on the ground that the May 19, 1981 Opinion of the South Carolina Supreme Court is not a final judgment or decree as is required by 28 U. S. C. § 1257.

## STATEMENT

Respondent Vernon E. Baumrind commenced an action against Petitioner James H. Ewing, on January 2, 1979. He alleged three causes of action, including alienation of affection, criminal conversation, and outrage.

During discovery proceedings, it was revealed that Respondent Baumrind obtained a portion of the information upon which he predicated his three causes of action against the Petitioner Ewing by monitoring and recording telephone calls to and from his residence.

While living in the marital home with his wife and two children, Respondent Baumrind installed an extension telephone in an upstairs closet. After listening to one or more conversations between Petitioner Ewing and Respondent's wife, Respondent Baumrind attached a recording device to the extension telephone he had previously installed. Neither the extension telephone nor the recording device were obtained from a communications carrier in the course of business. Both the extension telephone and the recording device were concealed in an upstairs closet. Both the extension telephone and the recording device were installed by the Respondent Baumrind without the assistance of any third person.

In a pre-trial motion, Petitioner Ewing sought an Order suppressing the tape recorded conversations between Petitioner and Respondent's wife. He further requested that he be permitted to amend his responsive pleadings to include a counterclaim against Respondent Baumrind for invasion of privacy. The motion to suppress and request

to amend were denied by Order of the Trial Court dated October 3, 1979. (Pet. App. A-2.) Petitioner Ewing appealed the Order denying his pre-trial motions to the South Carolina Supreme Court. On May 19, 1981, the South Carolina Supreme Court issued its opinion (Pet. App. A-6) affirming the October 3, 1979 Order and remanding the matter to the Trial Court for trial.

Petitioner Ewing sought a rehearing before the South Carolina Supreme Court. The Petition for a rehearing was denied by the South Carolina Supreme Court on June 22, 1981. (Pet. App. A-10.)

## ARGUMENT

1. The May 19, 1981 Opinion of the South Carolina Supreme Court, which Petitioner seeks to have this Court review on certiorari, is not a final judgment or decree as is required by 28 U. S. C. § 1257.

28 U. S. C. § 1257 provides that only "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .". Generally, the State Court judgment or decree must be final in two (2) respects. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final Court." *Market Street R. Co. v. Railroad Commission,* 324 U. S. 548, 551. "The finality requirement of 28 U. S. C. § 1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issue to leave a mini-

mum federal intrusion in state affairs." *North Dakota Board of Pharmacy v. Snyders Drug Stores, Inc.*, 414 U. S. 156, 159. "[A]n important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved." *Costarelli v. Massachusetts*, 421 U. S. 193, 196.

The concept of finality has a prenumbral area, thus "Only in a very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction." *Radio Station WOW v. Johnson*, 326 U. S. 120, 124. There are apparently four (4) categories of such cases in which the United States Supreme Court has taken jurisdiction under 28 U. S. C. § 1257 without awaiting the completion of additional proceedings anticipated in the state courts. See *Cox Broadcasting Corporation v. Cohn*, 420 U. S. 469, 477.

The first category includes actions where "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." Id., at 479. An example would be an action where the appellant or petitioner "could not prevail at trial on the facts or any non-federal ground." Id., at 479.

The second category of such cases are those "in which the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." Id., at 480. An example would be where the action "which remains to be taken could not remotely give rise to a federal question." *Radio Station WOW v. Johnson, supra*, at 127.

The third category includes actions "where the federal claim has been finally decided, with further proceedings on

the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Cox Broadcasting Corp. v. Cohn, supra* at 481. An example of such a situation would be a criminal action where acquittal at trial, under state law, would preclude an appeal by the state prosecution. *See California v. Stewart,* 384 U. S. 436.

The final category includes "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting Corp. v. Cohn, supra,* at 482, 483.

The May 19, 1981 Opinion of the South Carolina Supreme Court, which Petitioner seeks to have this Court review on *certiorari,* does not fall into any of the categories warranting departure from the generally recognized definition of "finality". The state court judgment or decree which Petitioner seeks to have this Court review contemplates, at a minimum, an entire trial yet to occur in the state courts, and perhaps additional motions and/or appeals. The possibilities are endless. The underlying dispute may be otherwise resolved. Additional federal questions may arise in the anticipated forthcoming state proceedings. Petitioner will not be barred from further appeals to the South Caro-

lina Supreme Court or this Court, irrespective of whether he is satisfied with the judgment of the trial court. Further proceedings in the state courts will not be barred if Petitioner prevails on the federal questions which he now seeks leave to raise, nor will those issues which Petitioner seeks to raise be rendered moot by further state court proceedings.

In summary, Respondent submits that the finality requirement of 28 U. S. C. § 1257 does not exist, that jurisdiction is absent, and that the Petition for a writ of *Certiorari* should be denied.

2. In any event, the decision of the South Carolina Supreme Court is plainly correct and does not warrant review.

In adopting the wire interception provision of the Omnibus Crime Control and Safe Streets Act of 1968, Congress did not intend to impose either criminal or civil sanctions upon a husband who, while living with his wife and two children in the conjugal relationship, became suspicious of his wife's fidelity, and who thereafter monitored and recorded telephonic communications between his wife and her lover, made over the family telephone, in the family residence, and there monitored and recorded, the husband being the subscriber for the family telephone service.

On its face, the language of 18 U. S. C. § 2511 is comprehensive. However, Respondent submits that the statute should not be given a literal application in all circumstances, irrespective of the circumstances and irrespective of the consequences. The statute is primarily penal in nature. Any person who violates the statute ". . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U. S. C. § 2511 (1).

The precursor of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968 was the Com-

munications Act of 1934, which provided: ". . . No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . ." 47 U. S. C. § 605. On its face, the Communications Act of 1934 contains language which is equally comprehensive as that appearing in the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968. However, in *Rathbun v. United States,* 355 U. S. 107, this Court rejected a literal application of that statute stating: "Every statute must be interpreted in light of reason and understanding" and that principal would be violated "if we attributed to Congress acceptance of the result that would occur here from the position argued by the Petitioner". *Id.,* at 109.

In effect, the Federal Courts refused to apply the sanctions of the Communications Act of 1934 unless there was both an expectation of privacy and a right to complain. *Generally see Rathbun v. United States, supra; Bufalino v. Michigan Bell Telephone Company,* 404 F. (2d) 1023 (6th Cir. 1968), *cert. den.* 394 U. S. 987; *Bubis v. United States,* 384 F. (2d) 643 (9th Cir. 1967); *United States v. Gallo,* 123 F. (2d) 229 (2nd Cir. 1941); *DiPiazza v. United States,* 415 F. (2d) 99 (6th Cir. 1969), *cert. den.* 402 U. S. 949.

The exceptions appearing in 18 U. S. C. § 2511 (2) and 18 U. S. C. § 2510 (5) are largely derived from those which the federal courts found to impliedly exist under The Communications Act of 1934. The expressly recognized exceptions which Congress has included in the current statute should not and cannot be interpreted so as to preclude the entire statute from being interpreted "in light of reason and understanding".

A literal interpretation of the statute would require prosecution of an innocent husband who monitored his

wife's "wire communication" with her lover solely by overhearing the "wire communication" on an extension telephone purchased from a legitimate retail outlet which did not fall into the classification of a "communications common carrier" under 18 U. S. C. § 2510 (5) (a) and 47 U. S. C. § 153 (h).

On the other hand, in an identical factual situation, with the only difference being that the extension telephone was obtained from a "communications common carrier in the ordinary course of its business", then under the exception appearing at 18 U. S. C. § 2510 (5) (a), no violation would exist. The distinction is inconsequential as a telephone may be legitimately obtained from either source, yet in the former situation, the husband commits a felony while in the latter he does not.

The statute must be interpreted ". . . in light of reason and common understanding . . .". Reason and common understanding dictate that the punitive provisions of the Act should not apply unless there was a justified expectation of privacy. *Rathbun v. United States, supra.*

Here, there are not, and cannot be, circumstances justifying a reasonable expectation of privacy. Respondent, his wife, and their two children were residing in the conjugal relationship in a common dwelling house. Respondent became suspicious of his wife's fidelity and installed an extension telephone for the purpose of monitoring telephone calls between his wife and her lover. After listening to one or more calls, Respondent attached a recording device to the extension telephone which he had previously installed. It was the family telephone. Respondent was the subscriber.

Petitioner simply had no reasonable expectation of privacy.

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone

and may allow another to overhear the conversation. When such takes place, there has been no violation of privacy of which the parties may complain. *Rathbun v. United States, supra,* 355 U. S. at 111.

There can be no expectation of privacy in favor of a husband against his wife, or in favor of a wife against her husband, living together in a common household, and involving the use of a family telephone, with respect to which the other spouse is the subscriber. Likewise, there can be no expectation of privacy in favor of a wife and her lover against the husband when using that telephone. "[T]he tapping of one man's telephone involves the tapping of the telephone of every other person who he may call, or who may call him." *Olmstead v. United States,* 277 U. S. 438, 376.

Petitioner has invaded Respondent's home and marriage and has been discovered by Respondent. Certainly Congress did not intend to protect and reward such actions.

As recognized by the Fifth Circuit Court of Appeals in *Simpson v. Simpson,* 490 F. (2d) 803 (5th Cir. 1974), *cert. den.* 419 U. S. 897, the legislative materials are "long, exhaustive, and inconclusive." *Id.* at 806. In addition to *Simpson, supra,* other courts have also reached the conclusion that Congress did not intend to proscribe the monitoring and recording of calls made or received by a family member over the family telephone by another member of the family. *See London v. London,* 420 F. Supp. 944 (S. D. N. Y. 1976); and *Anonymous v. Anonymous,* 558 F. (2d) 677 (2nd Cir. 1977).

The Sixth Circuit Court of Appeals, in its decision in *United States v. Jones,* 542 F. 2d 661 (6th Cir. 1976), while rejecting the *Simpson, supra,* rationale, noted that the case was "distinguishable from *Simpson* both legally and factually" 542 F. 2d at 666. Other cases cited by Petitioner are likewise distinguishable from the instant matter.

*White v. Weiss,* 535 F. 2d 1067 (8th Cir. 1976) involved a private investigator; *Remmington v. Remmington,* 393 F. Supp. 898 (E. D. Pa. 1975) involved a private investigator; *Kratz v. Kratz,* 477 F. Supp. 463 (E. D. Pa. 1979) involved an attorney; *United States v. Rizzo,* 583 F. 2d 908 (7th Cir. 1979) involved a private investigator; and *Rickenbaker v. Rickenbaker,* 226 S. E. (2d) 347 (N. C. 1976) involved separated spouses and a wiretap located outside the former marital home.

As recognized in *Benford v. American Broadcasting Company,* 502 F. Supp. 1159 (D. C. Md. 1980): "The legislative history of the Act indicates that Congress intended that a person's reasonable expectation of privacy was to be determined on a case-by-case basis, taking into consideration the particular facts and circumstances of each case." *Id.,* at 1162.

Congress did not intend the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968 to extend to the instant factual situation. The Act must be interpreted "in light of reason and common understanding". Reason and common understanding dictate that it does not apply to Respondent's actions.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 1981.